STATE OF MICHIGAN

IN THE SUPREME COURT

MARLETTE AUTO WASH, LLC,

Plaintiff/Cross-Defendant/Appellant,

v

VAN DYKE SC PROPERTIES, LLC,

Defendant/Cross-Plaintiff/Appellee.
_____/

Supreme Court No. 153979

Court of Appeals No. 326486

Sanilac County Circuit No. 14-035490-CH

Hon. Donald A. Teeple

Gaëtan Gerville-Réache (P68718)
Carly A. Zagaroli (P79358)
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2000
greache@wnj.com
czagaroli@wnj.com

Attorneys for Plaintiff-Appellant

John J. Bursch (P57679)
BURSCH LAW PLLC
9339 Cherry Valley Ave SE, #78
Caledonia, Michigan 49316
616.450.4235
jbursch@burschlaw.com

David A. Keyes (P43917)
KELLY LAW FIRM PLLC
627 Fort Street
Port Huron, Michigan 48060-3904
810.987.4111
dkeyes@porthuronlaw.com

Attorneys for Defendant-Appellee

REPLY BRIEF – APPELLANT MARLETTE AUTO WASH, LLC

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This Court granted leave to consider one specific issue: "whether open, notorious, adverse, and continuous use of property for at least fifteen years creates a prescriptive easement that is an easement appurtenant, without regard to whether the owner of the dominant estate took legal action to claim the easement." (3/22/2017 Order Granting Lv.) On that issue, Appellee Van Dyke SC Properties responds that, yes, the easement is created and vests at the end of 15 years (consistent with this Court's precedents), but theorizes that it is not yet "activated." To "activate" a prescriptive easement, Van Dyke (like the Court of Appeals) would require a judicial decree because "without that determination, there can be no property right at all." (Appellee's Br 1.) The Real Property Law Section ("RPLS") takes a somewhat different view, arguing that when the prescriptive period expires, it only creates or vests a "right to use and assert the prescriptive easement, not the establishment of an easement appurtenant." (RPLS Amicus Br 17.) It would require judicial action to create and vest the easement appurtenant.

On the contrary, a court's proper role in a real property dispute is to *declare* the parties' already vested rights, not to "activate," create, or vest them itself. For that reason, no court, including this one, has ever adopted this notion that the claimant must "activate" or create the easement appurtenant through litigation. Indeed, *Haab v Moorman*, 332 Mich 126; 50 NW2d 856 (1993), and *Wortman v Stafford*, 217 Mich 554; 187 NW 326 (1921), suggest just the opposite. Van Dyke and the RPLS ask the Court to limit those decisions to their facts to avoid a "secret easement" from surprising a bona fide purchaser. But they fail to realize that the courts already have rules to deal with this problem, in the extraordinary event that it ever arises. Contorting prescriptive easement doctrine into awkward positions is entirely unnecessary and only creates problems rather than solving them.

Desperate to wriggle out from under this issue, Van Dyke spends most of its brief arguing unpreserved, fact-laden claims of trial-court error, challenging the underlying premise for this appeal that there were 15 years of open, notorious, adverse, and continuous use. It did not cross-appeal for maintenance fees, nor did it bother to move under MCR 7.305(H)(4)(a) to add issues regarding whether Marlette's predecessor satisfied the basic elements for claiming a prescriptive easement. The Court should reject Van Dyke's attempt to turn this appeal into a second opportunity for plenary appellate review of issues it abandoned below.

REPLY ON THE ISSUE PRESENTED

I. No authority supports a judicial vesting or "activation" rule.

In its principal brief, Marlette Auto Wash showed that under *Haab*, *Wortman*, and fundamental principles of real property law adopted in this Court's other precedents, a prescriptive easement appurtenant vests by operation of law through the conduct of the property owners. Contrary to what the Court of Appeals held, no judicial decree is required. Lacking authority to contradict this conclusion or support the Court of Appeals' newly minted "judicial vesting" rule, Van Dyke tries to impose on Marlette the burden of finding a case that *expressly* rejects the Court of Appeals' unprecedented theory. This is obviously an impossible burden when the rule is unheard of, but *Haab* and *Wortman* and multiple decisions in other jurisdictions do already *implicitly* reject the Court of Appeals' theory. (See Appellant's Br 10-18.)

Marlette presented multiple decisions from this Court and other jurisdictions establishing that whenever the prescriptive period expires under a predecessor-owner, the court deems the prescriptive easement itself (not just a right to assert a claim) vested and holds that it then runs with the land to the benefit of the successor-owner. *Id*. No court has ever required a judicial decree for that to happen. The Court of Appeals' judicial vesting theory, on the other hand, bobs

alone in a vast sea of prescriptive easement decisions. Because Van Dyke is the one trying to establish a rule never heard of in the history of American common law, the burden is on Van Dyke to justify it. Van Dyke has failed to do so.

A. The cases Appellee and the RPLS cite only undermine their theory.

Van Dyke does not really bother to offer any analysis of its own; it instead offers the meager analysis in the Court of Appeals' opinion and that in the RPLS amicus brief, along with its own rhetoric. The Court of Appeals relied solely on a turn of phrase in *Matthews v Department of Natural Resources*, 288 Mich App 23; 792 NW2d 40 (2010), a case that did not even involve a claim based on the vesting of a prescriptive easement in a predecessor. The RPLS, for its part, offers no supporting authority either, only bald assertions about its aspirations for Michigan jurisprudence.

The RPLS argues that there is "a long line of Michigan cases, from *Siegel* to *Killips*, requiring the claimant to show that *he* can satisfy all of the elements required for a prescriptive easement, including continuous use for 15 years." (RPLS Amicus Br 7 (emphasis added).) Neither *Killips v Mannisto*, 244 Mich App 256; 624 NW2d 224 (2001), nor *Siegel v Estate of Renkiewicz*, 373 Mich 421; 129 NW2d 876 (1964), nor any other case that the RPLS cites has ever said that the easement is not created and vested in a predecessor-in-interest when the prescriptive period runs. In fact, *Siegel* and *Killips* suggest that it is.

In *Killips*, the court found that the claimant obtained a prescriptive easement from a predecessor without any finding that the claimant tacked to his predecessor. 244 Mich App at 259-260. There was only tacking between claimant's predecessors. *Id.* In *Siegel*, the Court considered whether the plaintiff *or his predecessor in title* had acquired an easement by use of the parcel for 15 years before concluding that "neither plaintiff nor his predecessor in title acquired title by adverse possession or an easement by prescription in this case." 373 Mich at 425-426. If

a claimant had to show that *he* could satisfy all of the elements himself, the *Killips* court would have required tacking to the claimant, and the *Siegel* court would not have inquired whether a predecessor acquired an easement by prescription.

B. Appellee's "many years" exception is arbitrary and only accentuates the conflict with *Haab* and *Wortman*.

Because it cannot reconcile the judicial-vesting policy with *Haab* and *Wortman*, Van Dyke suggests creating a giant exception to accommodate these decisions—an exception so enormous it almost swallows the Court of Appeals' novel rule. Again, in *Haab* and *Wortman*, this Court held that a prescriptive easement had vested in the claimant's predecessor, who had used the easement for many years beyond the prescriptive period, and that it then ran with the land to the claimant. 332 Mich at 143-144; 217 Mich at 559-560. There was no judicial action by the predecessor, nor any written or parole transfer of the easement. *Id*. Because these decisions conflict with Van Dyke's theory, it asks the Court to limit those decisions to their facts. This means holding that a prescriptive easement will vest in a predecessor if the use extends "many years" beyond the prescriptive period. This distinction shows how arbitrary the "judicial vesting" theory really is. Why is it acceptable for the prescriptive easement to vest in a predecessor after 25 years of continuous adverse use, but not after 15 years, when the official prescriptive period expires? No one has offered any logical explanation.

The RPLS suggests "harmonizing" *Wortman* and *Haab* with the new judicial-vesting rule by applying a different analysis found in *von Meding v Strahl*, 319 Mich 598, 614-615; 30 NW2d 363 (1947). That case stands for the proposition that the privity rule for tacking on prescriptive use to a predecessor's could be relaxed when the purchaser is familiar with the easement.[1] *Id.*

[1] In *von Meding*, neither the claimant nor his predecessor had used the way for the full prescriptive period of 15 years, though together they had used it for 25 years. 319 Mich at 612-614. Because the Flanagans, who purchased the land from the Dillenbecks, had used the way for

But this does not solve the notice problem that animates their rejection of the plain implications of *Wortman* and *Haab*. Privity reflects an understanding between grantor and grantee of the *dominant* estate that the inchoate claim of right to use the way will be conveyed with title to the property. See *id*.; *Siegel*, 373 Mich at 425; Restatement (Third) of Property (Servitudes) § 2.17 (2000) (explaining that before the limitation period expires, the right to a prescriptive easement is inchoate); see also *Olsen v Noble*, 209 Ga 899, 906; 76 SE2d 775 (1952) ("Inchoate prescriptive rights to an easement do not pass by a deed unless specifically mentioned."). Such privity does nothing to put the *servient* estate owner or future purchasers of that estate on notice.

In sum, while Van Dyke and the RPLS claim concern for the bona fide purchaser, they readily accept alternatives to the judicial-vesting rule that do nothing to provide notice. Their prescriptive easement theory is incoherent.

II. There is no bona fide purchaser or proof problem solved by the judicial-vesting rule; it only creates problems.

A broad rule of judicial vesting would do nothing to solve the notice problem either. Van Dyke presents an unrealistic "secret easement" scenario where the 15 years of use is open and obvious but the adverse nature of it is unknown even to the dominant estate owner, and purchasers on both sides proceed on the mistaken and shared belief that the use is permissive. A supposed proof problem arises when a mysterious octogenarian friend's testimony is later used to establish the use long-ago was adverse. The RPLS advances a different scenario where many years pass with no one using the easement before it is used again. These problems rarely, if ever,

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many years prior to purchasing the property, the court concluded "it was the intention of Dillenbeck to transfer her rights to the easement to the Flanagans," i.e., "there was a parol transfer by Mrs. Dillenbeck to the Flanagans . . . sufficient to permit the Flanagans to tack the prior adverse use." *Id*. at 614-615.

arise because a prescriptive easement does not exist in Michigan unless the use is open, notorious, continuous, *and* adverse. See *Wortman*, 217 Mich at 559.

For the use to be adverse, the "nature of the use [must be] such as to indicate that it was made under 'claim of right.'" *Mumrow v Riddle*, 67 Mich App 693, 697; 242 NW2d 489, 492 (1976). One would not expect such an adverse user to acquiesce to a latent grant of permission, much less tell a potential purchaser his use is only permissive. This is especially true in a case such as this, where the easement is the *only* available route absent demolition of buildings that contribute to the properties' value and revenue generation. (See Appellant's Br 4.) Thus, the adversity element largely eliminates Van Dyke's hypothetical.

But if these notice and proof issues did arise, the Court already has multiple doctrines at its disposal which are specifically tailored to deal with these supposed problems:

1. *The Bona Fide Purchaser Rule*: The general rule is that "an easement is not binding on a subsequent bona fide purchaser of the servient estate without notice thereof." *Butterfield v Brezina*, 3 Mich App 437, 442; 142 NW2d 900 (1966). Michigan courts have not yet had occasion to apply the bona fide purchaser rule to a prescriptive easement, probably because the use must be open, notorious, and adverse. But, if such a unicorn appears, the bona fide purchaser doctrine is the appropriate rule for protecting the innocent purchaser. The Court may decide, like the majority of jurisdictions, to just leave the purchaser to his remedies against the seller who misrepresented the use as permissive. See *Extinguishment of easement by implication or prescription*, §§ 2, 3, 174 ALR 1241. This does more justice than washing away the seller's sin by destroying his neighbor's right to use the way.

2. *The Nonuser Rule*: Even if the Court decides that the prescriptive user's reliance interest generally outweighs the bona fide purchaser's interest in barring access, it has another

doctrine to apply when reliance has faded. This Court recognized in *McDonald v Sargent*, 308 Mich 341, 345; 13 NW2d 843 (1944), that "[a] servitude easement imposed by prescriptive user for 15 years is lost by nonuser during a like period of 15 years." Thus, contrary to what the RPLS argues in its brief, a successor cannot resurrect an age-old prescriptive easement after more than 15 years of nonuse.

3. *The Clear and Cogent Evidence Standard*: In its "secret easement" scenario, Van Dyke strategically raises the specter of an octogenarian with a fine-tuned memory of his friend's long-forgotten adverse use because it evokes suspicion. One naturally wants the servient estate owner to have a defense against this apparent shenanigan, and Van Dyke invites the Court to use the judicial-vesting rule for this. But the servient estate owner already has a defense tailored to solve precisely this problem: prescriptive use for the required period must be shown by clear and cogent proof. *Outhwaite v Foote*, 240 Mich 327, 331; 215 NW 331 (1927); *Dummer v US Gypsum Co*, 153 Mich 622, 641-642; 117 NW 317 (1908). One can expect a trial judge to resist finding clear and cogent proof in the scenario Van Dyke presents, particularly when the original owner himself acquiesced to permissive use and future purchasers accepted this.

* * *

Unlike the rules above, the Court of Appeals' novel judicial-vesting rule does practically nothing to resolve issues of notice or proof because it operates only when there is a transfer of the *dominant* estate, and then only if there is no privity or "many years" of use. Lack of notice, however, can only arise upon transfer of the *servient* estate. Thus, if the judicial-vesting rule ever avoids a bona fide purchaser problem, it is only by happenstance. In the bulk of situations, this unprecedented rule would extinguish the right to an easement when there is no notice problem at all because it is not conditioned on whether the servient estate owner lacked notice.

For instance, every time there is a conveyance through foreclosure, privity would typically be lacking, the right to assert a prescriptive easement would dissipate under the Court of Appeals' judicial-vesting rule, and the servient estate owner who knew of and acquiesced in the adverse use for decades would receive a windfall. (See Michigan Bankers Association's Amicus Br.)

REPLY ON UNPRESERVED ISSUES NOT BEFORE THE COURT

No doubt aware that the Court of Appeals' decision was unsupported by any decision from any of the 50 states, the federal system, or even Puerto Rico, Van Dyke has sprung multiple new issues: First, it asks the Court to review whether B&J Investments had the right to claim an easement in the first place and argues a number of reasons why it did not. In doing so, Van Dyke raises a whole host of additional legal and factual issues, none of which were argued or decided below. It also asks the Court to consider whether it is entitled to maintenance fees. Because Van Dyke never filed an application to cross-appeal for maintenance fees under MCR 7.307(B) or asked for permission to brief any of these issues under MCR 7.305(H)(4), the Court should decline to entertain them.

It should also decline review because Van Dyke abandoned any dispute over satisfying particular elements of prescriptive use to focus solely on lack of privity. Van Dyke's counsel did not argue in his closing argument post-trial that B&J Investments' use was permissive or changed in 2000 (11/21/2014 Trial Tr 64-76, App 65a-77a), nor did he argue in the Court of Appeals that the trial court erred in finding the prescriptive period had run in 2005. That is why the trial court gave no special attention to the discrete issues Van Dyke now raises, and why the Court of Appeals accepted without question the trial court's ultimate finding that the prescriptive period had run in 2005. (COA Op 2, App 51a; Trial Court Op 5, App 47a.) Because Van Dyke did not claim this was error in the Court of Appeals, the issue was waived and is not preserved

for this Court's review. See *Admire v Auto-Owners Ins Co*, 494 Mich 10, 17 n 5; 831 NW2d 849 (2013).

Contrary to what Van Dyke argues, there is no manifest injustice that warrants bypassing the court rules to review forfeited issues; abandoning these issues was a sound strategic choice. B&J's decisions to build a carwash bay across the north entrance and let the city close off the access were powerful evidence that B&J used the parking lot under color of right. This seriously undercuts Mr. Zyrowski's self-serving testimony that he thought B&J only had revocable permission. Any remaining credibility dissipated when he evaded questions about his role in blocking that only entrance years later with snow, to the point that Judge Teeple had to pose the questions himself to get a straight answer. (11/20/2014 Trial Tr 59-61, App 58a-60a.) In light of this and the stringent standard for reviewing claims of factual error, the decision to abandon the issue of permissive use post-trial and on appeal makes perfect sense.

As for Van Dyke's claims of error in failing to find that the use changed in 2000 or was mutual, its counsel had good reason not to raise those issues as well. Van Dyke today contends that B&J's customers primarily used the north entrance before it was closed off (Appellee's Br 18), but at trial Zyrowski testified "[t]here wasn't any primary [entrance]." (11/21/2014 Trial Tr 31-32, App 63a-64a.) And with no evidence of an overburdening increase in traffic across the parking lot, there was no basis to find a change in use. As for mutual use, that rule only applies when the way is half owned by each lot owner. *Cheslek v Gillette*, 66 Mich App 710, 714-715; 239 NW2d 721 (1976); see also *Engel v Gildner*, 248 Mich 95, 99; 226 NW 849 (1929) (holding exclusivity is not required to establish a prescriptive easement). That is not the case here.

Finally, Van Dyke's revisionist view of the record starkly illustrates why the Court does not review unvetted or unpreserved issues. For example, on the unpreserved issue of permissive

use, Van Dyke asserts that Marlette's counsel conceded the use was permissive in its opening statement and never disputed that point. (Appellant's Br 18.) But the prior transcript page (omitted from Van Dyke's appendix) shows that Marlette's counsel is paraphrasing *Van Dyke's* responses to interrogatories. (11/20/14 Trial Tr 12, App 55a.) He then makes clear the issue is hotly contested, stating: "The evidence conclusively establishes that Mr. Zyrowski didn't have any more permission than I have hair on my head. And when he got sued, he knew he was in trouble and he made it up." (*Id*. at 17, App 56a.) Similarly, Van Dyke contends that when Mr. Lipka's company paid B&J $1.2 million for the property, Lipka didn't think there was an easement. (Appellee's Br 7.) But on the next page of the transcript (again, omitted from Van Dyke's appendix), Mr. Lipka explains that as a real estate broker, he "didn't think there would be an issue with going in and out of the back of that lot" because he had a "good claim for a prescriptive easement." (11/21/14 Trial Tr 17, App 62a.) Unpreserved issues naturally lend themselves to these sort of mistakes, because they lack the benefit of review in the lower courts.

The court rules prevent exactly this sort of surprise maneuver by (a) giving this Court an opportunity to vet by motion or application any additional issues that would be raised and (b) giving the other side advance notice of the issues on appeal. See MCR 7.307(B), 7.305(H)(4). The Court should strictly enforce these rules and reject Van Dyke's attempt to inject additional unpreserved issues.

CONCLUSION AND REQUESTED RELIEF

The Court of Appeals' judicial-vesting rule is anathema to real property law and this Court's prescriptive easement doctrine. This unprecedented rule should be rejected and the Court of Appeals' decision reversed.

Respectfully submitted,

Dated: August 31, 2017

WARNER NORCROSS & JUDD LLP

By */s/ Gaëtan Gerville-Réache*

Gaëtan Gerville-Réache (P68718)
Carly A. Zagaroli (P79358)
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2000
greache@wnj.com
czagaroli@wnj.com

Attorneys for Plaintiff-Appellant

16138801